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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 208

LOUIS KULESZA, FRANK HEYNAR and ZIGMUNT
DZIENISIEWICZ, also known as Zigm. Dzienisiewicz,
Petitioners,

v.

AMERICAN CAR AND FOUNDRY CO., a corporation,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, AND BRIEF
IN SUPPORT THEREOF.**

HAROLD O. MULKS,
Counsel for Petitioner,
155 No. Clark Street,
Chicago, Illinois.

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INDEX

	Page
Petition for Writ of Certiorari	1-6
Statement of the matter involved	1-4
Question presented	4
Jurisdiction	4
Reason for granting Certiorari	5-6
Prayer for Writ	6
Brief in Support of Petition	7-11
Propositions of Law relied upon	7-9
Argument	10-11
1. The allegations of the Petitioners' Complaint were sufficient to show that the Noteholders were the equitable owners of the patent	10
2. The equitable owner of a patent may maintain a complaint in equity for the infringement of the same, by joining the legal owner of the patent as a defendant	10
3. The legal owner was joined as a Defendant.....	10
4. The fact that certain individuals who claimed an interest in the patent were made parties co- defendant, did not deprive the Court of juris- diction	11
5. Inasmuch as the case was a complaint in equity, it was of no importance that said individuals were before the Court as Co-defendants and not as Co-plaintiffs	11
6. The fact that the individual Co-defendants joined in the prayer of the Petitioners' complaint, that the Court find that the patent had been in- fringed by the Respondent, rendered said indi- viduals Co-plaintiffs	11

7. That portion of the petitioners' complaint, in which it was prayed that the Court adjudicate the rights of the petitioners and the class represented by them, against the individual Co-defendants, who were residents of the same State as Petitioners, could be disregarded as surplusage, or stricken out, and the balance, which pertained to the matter of the infringement of the patent, retained	11
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CASES CITED:

Deitel v. Chisholm, 42 Fed. (2nd) p. 172	8
General Baking Co. v. Schultz Bread Co., 288 Fed. 954, affirmed in 293 Fed. 1018	9
Hurn v. Oursler, 289 U. S. 238	9
Hamer v. New York Railways Co., 244 U. S. 267	9
Independent Wireless Co. v. Radio Corporation, 269 U. S. 459	8
Libbey Glass Co. v. McGee Glass Co., 216 Fed. 172, affirmed 220 Fed. 672	8
Lindauer v. Companio Palomas, 247 Fed. 428	9
Piatt v. Oliver, Fed. Cases, No. 11,116	8
Planten v. Gedney, 224 Fed. 382	9
Pomeroy Equity Jurisprudence, 4th Edition, Sec. 114; Vol. I, p. 134	8
Radio Corporation of America v. Emerson, 296 Fed. 51	8
Sadler v. Taylor, 49 West Va. 104, 38 S. E. 583	8
Sapp v. Phelps, 92 Ill. 588	8

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PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioners, Louis Kulesza, Frank Heynar and
Zigmunt Dzienisiewicz, also known as Zigm. Dzienisiewicz,
respectfully represent and show unto the Court as fol-
lows:

That, on the 15th day of February, 1939, the United States District Court for the Northern District of Illinois, dismissed on motion of the Respondent, the American Car & Foundry Company, a corporation, the complaint, in equity, of the Petitioners against said Respondent, for the alleged infringement of Letters Patent, No. 886,541 (R. 108), and that afterwards, on the 29th day of February, 1940, the United States Circuit Court of Appeals for the Seventh Circuit, affirmed said order of the District Court (R. 158), and afterwards, on the 8th day of April, 1939, said Circuit Court of Appeals denied the petition of these Petitioners for a re-hearing (R. 159). The opinion of the Circuit Court of Appeals (R. 156-7) is published in 11 Federal, 2nd Reports, p. 58.

In the complaint of the Petitioners filed in the District Court (R. 2-14), in addition to alleging that said patent had been infringed by said Respondent, the American Car and Foundry Co., a corporation (R. 7), the Petitioners alleged; that said Letters Patent were issued to one, Elbert R. Robinson (R. 4); and that a group, which was composed of more than two thousand (2,000) persons, and of which said group Petitioners were all members; and, on whose behalf the Petitioners filed said complaint as a representative suit (R. 6); had advanced to said Robinson sums of money which aggregated an amount in excess of one million (\$1,000,000.00) dollars (R. 5); and for which said various sums of money, said Robinson executed notes by which he agreed to pay said persons certain sums of money which aggregated an amount in excess of fifty million (\$50,000,000.00) dollars; and that said notes were in effect secured by, and constituted a first lien and mortgage on said Patent (R. 5); and that the said several sums agreed to be paid by said Robinson, as evi-

denced by said notes, aggregated an amount far in excess of the value of said Patent, and far in excess of what could be recovered for the infringement of the same (R. 5).

It was further alleged, that said Robinson was deceased and that one, Addie Robinson, had been appointed administratrix of his estate (R. 4). Said Addie Robinson, as administratrix (R. 12) and various other individuals (R. 11-12), were made parties defendant to Petitioners' complaint, and it was averred that each claimed to have some interest in said Patent, but that their respective interests were subordinate to the interest of Petitioners and of the class represented by them (R. 11-12). No averment was made in said complaint that the individual defendants were residents of different states than the Petitioners.

The individual defendants, including the administratrix of Elbert R. Robinson, deceased, executed with the Petitioners written agreements which were filed in this case in the District Court (R. 85-87), in which said agreements the individual defendants "adopted and ratified" that portion of the Petitioners' complaint in which it was charged that the Respondent had infringed said Patent; and by said agreements, said Defendants also joined in the prayer in said complaint, that the Court find that said Patent had been infringed by the Respondent; and asked the Court, to proceed to determine the question of infringement, and to leave the matter of the rights of the Petitioners and the class represented by them against said individual defendants; to be determined in an "ancillary proceeding."

The Respondent moved to dismiss the Petitioners' complaint upon the following grounds:

1. Lack of jurisdiction to adjudicate conflicting title claims between the Plaintiffs and nominal Defendants, all citizens of the State of Illinois.

2. Lack of title of the Plaintiffs to the patent in suit (R. 105).

The Court sustained said motion and dismissed the Petitioners' complaint (R. 108).

The District Court, in its opinion (R. 108-112) held that the owner of the equitable title to a patent could maintain an action for the infringement of the same, by joining the holder of the legal title as a defendant, but that the rule was not applicable in this cause, because, as stated by the Court, the complaint did not rely upon an outstanding title but denied that there was any outstanding title (R. 111).

The Court of Appeals affirmed the Decree of the District Court (R. 158). None of the individual Defendants appeared in said cause in the Circuit Court of Appeals.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code as amended by the Act of February 19, 1925.

QUESTION PRESENTED:

Did the fact that the administratrix of the deceased patentee, Robinson, together with the other individual defendants, joined in that prayer of the Petitioners' complaint, whereby it was prayed that the Court find that said patent had been infringed by the Respondent; render

said administratrix and the other individual defendants; co-plaintiffs with the Petitioners, and vest the Court with jurisdiction of the cause?

SPECIFICATION OF ERRORS TO BE RELIED UPON.

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In not reversing the decree of the District Court and remanding the cause with directions to rule the Respondent, the American Car and Foundry Company, a corporation, to answer the same.

2. In declining to hold, that the fact that the administratrix of the deceased patentee Robinson, together with the other individual defendants joined in the prayer of the Petitioners' complaint, whereby it was prayed that the Court find that said Patent had been infringed by the Respondent; rendered said administratrix and other individual defendants joint plaintiffs with the Petitioners, and vested the Court with jurisdiction of the cause.

REASONS FOR GRANTING THE WRIT.

The reasons urged for granting the Writ of Certiorari are:

First: That while no decision of this Court or of any Circuit Court of Appeals has been found that is directly in point, the decision of the Circuit Court of Appeals in this cause is, nevertheless, in conflict with the principles stated and applied in numerous decisions of other Circuit Courts of Appeal, and also of this Court.

Second: The question is of public importance, for the reason that the necessary effect of the decision of

the Circuit Court of Appeals is to deprive persons who advance money to inventors, under circumstances similar to those disclosed herein, of any remedy in the premises.

Wherefore, your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, and commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket: "Louis Kulesza, Frank Heynar and Zigmunt Dzienisiewicz, also known as Zigm. Dzienisiewicz, Plaintiffs-Appellants, *v.* American Car and Foundry Company, a corporation, *et al.*, Defendants-Appellees. No. 7039." And that said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your Petitioners will ever pray.

Dated Chicago, Illinois, July 3, 1940.

Louis Kulesza,
Frank Heynar, and
Zigmunt Dzienisiewicz,

By HAROLD O. MULKS,
Counsel for Petitioner.

PETITIONER'S BRIEF

IN THE

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AMERICAN CAR AND FOUNDRY CO., a corporation,
Respondent.

BRIEF IN SUPPORT OF PETITION.

PROPOSITIONS OF LAW RELIED UPON.

I.

The owner of the equitable title to a patent may bring an action in equity in a Federal Court for the infringement of the same, by joining the legal owner of the patent as a Defendant with the alleged infringer. In such a situa-

tion the Court can grant appropriate relief, notwithstanding that the legal owner of the patent is before the Court as a nominal Defendant and not a Co-plaintiff.

Radio Corporation of America v. Emerson, 296 Fed. 51.

Deitel v. Chisholm, 42 Fed. (2nd) p. 172.

Ind. Wireless Co. v. Radio Corporation, 269 U. S. 459.

Libbey Glass Co. v. McGee Glass Co., 216 Fed. 172.
Affirmed 220 Fed. 672.

II.

It is of no importance in equity suits, that a party occupies the position of a Defendant, rather than of a Co-plaintiff; if the rights and interests of such party are similar to that of the Plaintiff, and adverse to the interests of any Defendant, the rights of such party, against such other Defendant, can be adjudicated as fully as if he were made a nominal plaintiff.

Piatt v. Oliver, Fed. Case No. 11,116.

Sapp v. Phelps, 92 Ill. 588.

Pomeroy Equity Jurisprudence, 4th Edition; Sec. 114; Vol. I, p. 134.

Sadler v. Taylor, 49 West Va. 104, 38 S. E. 583.

III.

Where a Defendant in chancery joins in the prayer of the complaint, with the Plaintiff, he becomes, for all practical purposes, a co-plaintiff with the original party.

Lindauer v. Companio Palomas, 247 Fed. 428.

Hamer v. New York Railways Co., 244 U. S. 267.

IV.

Where a complaint in equity in a Federal Court states several causes of action; and the Court has jurisdiction of but one of them, the matters over which the Court has no jurisdiction will be stricken out and the complaint will be retained as to the matter over which the Court has jurisdiction.

General Baking Co. v. Schultz Bread Co., 288 Fed. 954, affirmed in 293 Fed. 1018.

Planten v. Gedney, 224 Fed. 382.

Hurn v. Oursler, 289 U. S. 238.

ARGUMENT.

The theory of the Petitioners was, and is, that the allegations of their complaint that the notes in question "were in effect secured by, and constituted a first lien and mortgage on said patent" (R. 5), was sufficient to show that the owners of the notes were the equitable owners of the patent. And, further, it was, and is, their position that the equitable owner of the patent may maintain a bill in equity for the infringement of the same by joining the legal owner thereof as a party defendant.

This, it is respectfully submitted, is amply sustained by the authorities cited in Point I of Propositions of Law Relied Upon. The administratrix of the deceased patentee, who must, in the absence of an averment to the contrary, be presumed to be the owner of the patent, was made a party defendant. Hence, the legal owner of the patent was before the Court as a party defendant. And, hence, it follows that the Petitioners were entitled to relief, unless the joinder of said other individuals as Defendants, ousted the Court of jurisdiction.

It is the position of these Petitioners that such joinder did not divest the Federal Court of jurisdiction. The fact that such parties were before the Court as co-defendants rather than as co-plaintiffs, was of no importance, because the Petitioners' complaint was in equity, and the rights of said individuals including the administratrix of the deceased inventor, could be adjudicated against the alleged infringer, the Respondent here, as fully as if said parties had joined as co-plaintiffs.

(See authorities cited in Point II of Propositions of Law Relied Upon.)

Further, in any event, inasmuch as the individual defendants joined in that prayer of the Petitioners' complaint whereby it was prayed that the Court find that said patent had been infringed by the Respondent, they became, for all practical purposes, co-plaintiffs with the Petitioners.

(See authorities cited in Point III of Propositions of Law Relied Upon.)

Further, the fact that Petitioners prayed the Court in their complaint to adjudicate their rights against the individual defendants, without an averment that said defendants were residents of different States than the Petitioners, did not deprive the Court of jurisdiction, to adjudicate the question of infringement of the patent for the reason, that the joinder of a non-federal question with a federal question does not oust the Court of jurisdiction over the federal question; but the portion pertaining to the non-federal question, may be disregarded as surplusage or stricken out, and the Court may retain jurisdiction over the portion pertaining to the federal question.

(See authorities cited in Point IV of Propositions of Law Relied Upon.)

It is, therefore, respectfully submitted that the Writ of Certiorari should be granted, that the judgment of the Circuit Court of Appeals for the Seventh Circuit, and of the District Court for the Northern District of Illinois, Eastern Division, be reversed, and that this cause be remanded to the District Court, with instructions to rule the Respondent to answer the Petitioners' complaint.

Respectfully submitted,

HAROLD O. MULKS,

Counsel for Petitioners.